NO. 22289

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT EMMETT GANGWER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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NO. 22914

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I

STATEMENT OF THE CASE AND JURISDICTION

This is an appeal of a judgment of conviction entered by the United States District Court for the Central District of California upon jury verdicts of guilty on Counts One, Two, Four, Five and Six of a six-count indictment charging unlawful concealment and sale of marihuana, 21 U.S.C. §176(a).[1/]

1/ Title 21 U.S.C. §176(a) provides:

". . . Whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or (continued)

Jurisdiction to review the judgment of conviction below is conferred upon this Court by Title 28, United States Code, §§ 1291 and 1294.

II

STATEMENT OF FACTS

On December 19, 1966, federal narcotics agent Knapp was telephonically advised by government informant Van Noy that Knapp and the informant could purchase 5 kilograms of marihuana from defendant Gangwer on the same day [R. T. 39-40]. 2/ At 2:45 p.m., Knapp and Van Noy drove to Gangwer's apartment and met him [R. T. 40-41]. After introducing himself, Gangwer pointed to a box containing 4 1/2 kilogram-bricks of marihuana [R. T. 41-2, 51-2, 105-B]. Knapp had a conversation with Gangwer in which Gangwer said he could get marihuana in larger

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1/ (continued) in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury..."

2/ R. T. Reporter's Transcript.

quantities and set the price for the 4 1/2 kilograms of marihuana at $450 [R. T. 43]. Knapp handed Gangwer $450.00, took the marihuana, and departed with Van Noy [R. T. 43, 127].

On January 21, 1967, the informant Van Noy called Gangwer and arranged a second sale of marihuana [R. T. 47]. Agents Knapp and Downing then drove to 17361 Parthenia, Northridge, California, and met Gangwer [R. T. 47-8]. Gangwer took the agents into the backyard and showed them three boxes of marihuana (approximately 44 kilograms) [R. T. 48, 52-5, 108-110]. While Gangwer and Knapp were agreeing on the price ($75.00 per kilogram-brick), Agent Downing took two kilogram-bricks out of the boxes and returned to the government vehicle, ostensibly to check their weight [R. T. 49]. Shortly thereafter, Gangwer was arrested [R. T. 49]. A search of the premises at the time of the arrest resulted in the seizure of two kilogram-bricks of marihuana from Gangwer's vehicle [R. T. 54, 108-112].

Prior to the first transaction on December 19, 1966, the informant had spoken several times with Gangwer over the telephone after receiving Gangwer's number from one Mike Penneys [R. T. 145]. On the first telephone call, Gangwer agreed to sell marihuana to the informant although Gangwer had never met informant Van Noy [R. T. 146], Gangwer told Van Noy that he would be interested in future marihuana deals [R. T. 147]. Gangwer and the informant also discussed a pending LSD transaction of the defendant's, and whether or not the informant would "front" the money (pay for the marihuana in advance of delivery) [R. T. 149-

150]. Gangwer told Van Noy that he was connected with a large organization and that he was interested in regularly distributing large amounts of marihuana [R. T. 150]. Gangwer's only expressed reluctance to sell marihuana was because of his pending LSD transaction [R. T. 154].

The informant had originally been referred to Gangwer by Mike Penneys. Penneys told the informant that Gangwer was involved in an LSD transaction with Penneys and that Gangwer [R. T. 164] would sell marihuana to the informant [R. T. 164].

For the first time on the day of trial and without supporting affidavits, defendant sought a continuance for the purpose of contacting a witness, one Mike Penneys, whom the defendant for several weeks unsuccessfully had sought to locate and serve with a subpoena [R. T. 11]. Counsel represented that he expected Penneys' testimony would show that Penneys had agreed with the informant to involve Gangwer, and that Penneys was the "moving spirit behind [the transaction]." Counsel further stated that Gangwer spent 10 days in San Francisco looking for the witness [R. T. 11].

III

QUESTIONS PRESENTED

A. Did the trial court abuse its discretion in denying defendant's motion for a continuance?

B. Was the entrapment instruction given by the trial

court erroneous?

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR CONTINUANCE.

The granting of a continuance is within the discretion of the trial court. Absent a clear abuse of that discretion, the denial of a continuance is not subject to review.

Elkins v. United States, 266 F. 2d 588 (9th Cir. 1959);

Sherman v. United States, 241 F. 2d 329 (9th Cir. 1957);

Hutson v. United States, 238 F. 2d 167 (9th Cir. 1956);

Williams v. United States, 203 F. 2d 85 (9th Cir. 1953).

United States v. White, 324 F. 2d 814 (2nd Cir. 1963), and Scott v. United States, 263 F. 2d 398 (5th Cir. 1959), relied upon by Gangwer are inapposite. In White, the informant, a percipient witness, was unavailable due to illness, although his whereabouts were known. In Scott, a co-conspirator and percipient witness had been subpoenaed by the defendant, but failed to appear claiming illness. Here, however, the only agents of the Government involved in the transactions testified at the trial.

The witness sought by the defendant was entirely

unconnected with the Government. Moreover, the sole contact between informant Van Noy and the witness Penneys regarding the transaction with Gangwer was prior to the first of two transactions, where Penneys gave Van Noy Gangwer's name and telephone number as a possible source of marihuana [R. T. 145-6, 174].

Whether Penneys induced Gangwer to sell to the agent in this case is immaterial under these circumstances, since the entrapment defense does not extend to inducement by a private citizen who is unconnected with the Government.

United States v. De Alesandro, 361 F. 2d 694 (2nd Cir. 1966);

Gonzales v. United States, 251 F. 2d 298 (9th Cir. 1958);

See Notaro v. United States, 363 F. 2d 169, (9th Cir. 1966).

B. THE TRIAL COURT'S INSTRUCTION ON ENTRAPMENT WAS NOT PLAIN ERROR.

No exception to the Court's instruction was made by defendant in the trial court; neither did defendant state distinctly an objection to the court's instruction and his grounds. In fact, defense counsel specifically stated that the court's instruction correctly stated the law and that he saw no error in it [R. T. 205]. Counsel added that he preferred his requested instruction because it is longer and therefore places more emphasis on his entrapment

defense [R. T. 188].

Having failed to comply with the terms of the Federal Rules of Criminal Procedure, Rule 30, [4/] defendant is entitled to a reversal only if the instruction given constitutes plain error.

Nordeste v. United States, ___F. 2d___(9th Cir. 1968) (No. 21, 294, April 4, 1968);

Robison v. United States, 379 F. 2d 338 (9th Cir. 1967);

Reid v. United States, 334 F. 2d 915 (9th Cir. 1964).

Notaro v. United States, supra, and Pratti v. United States, 389 F. 2d 660 (9th Cir. 1968), require that an entrapment instruction includes a statement that defendant must be acquitted (1) if the jury entertains a reasonable doubt as to whether the defendant was entrapped, and (2) if the government fails to sustain its burden of proving beyond a reasonable doubt that defendant was not entrapped. The trial court's instruction in this case accurately

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4/ Rule 30 provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

charged the jury as to the burden and degree of proof [R. T. 263-4].

Defendant's requested instruction, on the other hand, is probably erroneous, as pointed out by the trial court [R. T. 204], since it fails to explain the burden of proof, and it introduces the often-criticized distinction between lawful and unlawful entrapment, e.g., United States v. Pugliese, 346 F. 2d 861 (2nd Cir. 1965), cited in Notaro v. United States, supra.

Although the issue is not mentioned in Notaro or Pratti, appellant asserts error occurred when the court failed to give a "specific" instruction on entrapment, citing Raffis v. United States, 364 F. 2d 948 (8th Cir. 1966) and Collier v. United States, 301 F. 2d 786 (5th Cir. 1962).

In Raffis, no error occurred when defendant's proffered "theory of defense" instruction was refused, since the instruction given adequately explained defendant's position. In dictum, the Court added that the "theory of defense" instruction "may be specific". 364 F. 2d at 956.

In Collier, the entrapment instruction was patently erroneous, and included a misstatement of the evidence. 301 F. 2d at 787. The case does not hold that it is plain error to give a "general" entrapment instruction.

Appellant's reliance on Sherman v. United States, 356 U. S. 369 (1958), is similarly misplaced. Sherman approves the long-standing rule that once entrapment is asserted, the Government is entitled to conduct an appropriate and searching inquiry into

the defendant's conduct and predisposition to commit the crime charged. 356 U S. at 372; Sorrells v. United States, 287 U. S. 435, 451 (1932).

Neither Notaro, Pratti, nor Sherman describes or requires an instruction containing a detailed description of the evidence required to prove predisposition. The trial court accurately and clearly charged the jury as to the burden and degree of proof necessary to show that defendant was not an unwary innocent regarding possession and sale of illegal drugs.

Appellant's only complaint, and one never adverted to by defense counsel at trial, is that the instruction given failed to specifically state that the defendant must be shown to have had a willingness to commit a crime "of the nature of the offense charged." In this regard, appellant claims certain evidence might have misled the jury, namely, Gangwer's prior possession of marihuana, a fact admitted by defendant, and Gangwer's conversations regarding a sale of LSD. It is submitted that the jury could not have been misled, since such conduct is probative on the issue of the defendant's predisposition to conceal, transport, or sell marihuana. See Sherman v. United States, supra; Sorrells v. United States, supra; Robison v. United States, supra at 346; Notaro v. United States, supra at 172; Reid v. United States, supra at 917; Whiting v. United States, 321 F. 2d 72, 77 (1st Cir. 1963), cert. denied, 375 U. S. 884; Carson v. United States, 310 F. 2d 558 (9th Cir. 1962).

Nordeste v. United States, supra, considers a similar

contention. For the first time on appeal, Nordeste contended that the use of the term "innocent person" in an entrapment instruction may have misled the jury into believing that entrapment is only available to one who is otherwise innocent. In affirming the conviction, the Court said:

> While it is preferable to avoid use of the term "innocent person" in an instruction on entrapment, we do not believe that, in the context of this particular instruction, the term rendered the instruction erroneous. The concept of unlawful entrapment has always been thought of as safeguarding one who is innocent of any preconceived intent to commit the crime charged, while denying protection to one who has a criminal intent and is ready to grasp an opportunity to fulfill that intent. We think the term was used in this sense in the instruction under consideration and that it was so understood by the jury.

Similarly, under the circumstances of the instant case, it is submitted that the instruction given was properly understood by the jury.

V

CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted,

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